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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 483

JOHN J. CASALE, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

Appellant seeks review of the final judgment of a three-judge district court (J.S. 21-31) dismissing its suit to set aside a decision of the Interstate Commerce Commission. The Commission held that apellant's proposed leasing of motor vehicles, with drivers, for operation beyond the New York City Commercial Zone would constitute for-hire carriage subject to Com-

mission regulation, rather than the mere provision of equipment to the shippers as private carriers (for which no operating authority is required). Applying this Court's holding in *United States* v. *Drum*, 368 U.S. 370, the district court upheld the Commission on the grounds that, in determining the character of the proposed operation, the Commission properly "looked at the totalities of the situation" and that its determination was supported by the undisputed facts of record (J.S. 29-31).

Appellant is engaged in the business of leasing motor vehicles to shippers of many different commodities in the New York City area. At present, appellant leases vehicles without drivers for operation within and beyond the so-called New York City Commercial Zone, and with drivers (who are on appellant's payroll) for operations within the Zone.[1] It seeks to enlarge its service and provide the latter type of operation outside the Zone—that is, appellant would furnish vehicles along with drivers who would be its employees. To test the Commission's authority over this proposed operation, appellant applied for a contract carrier permit to operate in the proposed manner beyond the Zone, and during the course of the proceeding moved to dismiss its application on the ground that it proposed merely the provision of vehicles and drivers

[1] Motor vehicle transportation within a commercial zone is given a limited exemption from regulation by the Commission under Section 203(b)(8) of the Interstate Commerce Act, 49 U.S.C. 303(b)(8). The New York City Commercial Zone was defined by the Commission in *Commercial Zones and Terminal Areas*, 54 M.C.C. 21, 90-92.

for use in private carriage beyond the Zone, a service not subject to the jurisdiction of the Commission.[2]

The Commission found that appellant owns and leases 918 motor vehicle units. It maintains garage and repair facilities at various points in the New York City area where most of its equipment is serviced and maintained, regardless of whether the vehicles are leased with or without drivers (J.S. 35). All maintenance and repairs are performed in appellant's garages and shops, except for road emergencies (J.S. 36). When a vehicle is disabled, appellant provides substitute vehicles from its pool of motor trucks. It maintains public liability and property damage insurance for all vehicles (J.S. 36-37).

When appellant presently furnishes drivers with vehicles in the New York Commercial Zone, as proposed in its application in this case for operations outside the Zone, appellant itself directly employs the drivers (subject to the particular lessee's approval) and pays them, although lessees receive weekly statements from appellant showing the various charges and expenses that are due; in paying for driver services, the lessees indirectly bear the cost of wages, taxes, insurance, etc. (J.S. 35-36).[3] Appellant provides ga-

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[2] A motion to dismiss one's own application is an accepted method of securing a determination of the status of transportation operations. See, *e.g.*, *Schenley Distillers Corp.* v. *United States*, 326 U.S. 432, 436.

[3] In the present operations outside the New York City Commercial Zone, vehicles leased by appellant are driven by employees of the lessees. However, it was found that, even in that situation, appellant would furnish the drivers to be hired by the lessees. Appellant

rage storage for the vehicles under most leases, and drivers employed by it for leased vehicles punch a time clock at its garage. When the vehicles are garaged by lessees and the drivers paid by appellant, the drivers punch time clocks on the premises of the lessees, who submit the cards to appellant weekly for preparation of the wage checks for drivers and invoices for lessees. The Commission also found that appellant keeps the employment and payroll records of each driver, whether on its own payroll or that of a lessee (J.S. 36, 42). While drivers employed by appellant are assigned to particular lessee accounts, in emergencies appellant will switch drivers among those lessees which are under the same union jurisdiction (J.S. 36).

The Commission found that the proposed arrangement was designed to, and would, "relieve the lessees of any real responsibility as employers over their drivers" (J.S. 41). It also found that "for the purpose of determining whether a for-hire transportation service would be rendered," appellant "would be the one who exercises control over the driver" and the lessees' control would be no more than that exercised by "many

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would contact the appropriate union official and ask for drivers, arrange and conduct the initial interview; check the drivers' references (unless it chose to rely on the union endorsement); check the results of a medical examination; and, if the driver be found physically fit, only then send the driver to the lessee, who would make the final decision to sign him up as an employee (J.S. 39, 42). On the basis of this and other evidence, the examiner found that the *present* operations outside the Zone—as well as the proposed service—constituted "for-hire carriage" requiring certification (J.S. 38). The Commission made no finding about the present operations, and there was no such issue in the court proceeding.

shippers utilizing for-hire transportation service" (J.S. 42). Even though lessees under the proposed operation would (not unlike shippers patronizing regulated carriers), retain control over the "physical transportation" performed with the leased vehicles, including the loading of vehicles, scheduling of departures, and routing of traffic, such control did not require a conclusion that the lessees were engaged in private carriage (J.S. 42-43). Rather, the Commission looked beyond the question of transportation control and evaluated the "total situation" presented by the proposed service (J.S. 43). The Commission concluded (*ibid.*):

> The overall operation here revealed is the provision of a comprehensive motor carrier service to shippers for compensation. We therefore conclude that the operation would be that of applicant, and would constitute for-hire carriage.[4]

The district court affirmed (J.S. 21-31) on the basis of *United States* v. *Drum*, 368 U.S. 370.

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The opinion of the Court in *United States* v. *Drum*, *supra*,

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[4] The Commission, after finding that appellant was required to obtain operating authority to perform the proposed operation, denied the application for such authority (J.S. 43-46). Appellant did not challenge the denial of operating authority in the court below but only the determination that the proposed operation would constitute for-hire carriage (J.S. 5). Only the latter issue is presented by the appeal to this Court (J.S. 3).

settles the applicable law, and, as the court below concluded, the Commission's application of the law to the particular facts of this case was proper.

1. In *United States* v. *Drum*, *supra*, this Court held that, for a transportation service to be classified as private carriage, the shipper must "assume in significant measure the characteristic burdens of the transportation business" (368 U.S. at 375). The Court approved the standards developed by the Commission for determining that issue—*i.e.*, that, while the degree of control exercised by the shipper over the transportation operation is an important factor, the vesting of "physical direction of the details of the operation" in the shipper "would not in itself suffice to render the transportation private carriage" (368 U.S. at 381, 383); the ultimate judgment as to the various factors making up the "burdens of transportation" is one upon "totalities" (368 U.S. at 384).

In the present case, the Commission carefully adhered to the standards approved by this Court in the *Drum* case. Fully analyzing the factual circumstances, the Commission recognized that appellant's lessees would have "control over the physical transportation" involved but concluded that such control would not have "all-important significance" in determining whether the transportation was private or for-hire carriage (J.S. 43). "[W]e must look," the Commission stated, "at the total situation"; and, so doing, it found that the "overall operation" at issue was "the provision of a comprehensive motor carrier service to ship-

pers for compensation"—*i.e.*, for-hire, and not private, carriage (*ibid.*). As the court below succinctly found, "the Commission in reaching its determination that this was for-hire carriage did not rely entirely on the 'control' test but looked at the totalities of the situation" (J.S. 31).[5]

2. In *United States* v. *Drum*, *supra*, this Court concluded that certain financial risks with respect to vehicles were properly considered to be among the "characteristic burdens of the transportation business" so that a shipper's shifting of those risks to individual owner-operators justified a finding of for-hire carriage despite the existence of an employment relationship between the shipper and the owner-operators (368 U.S. at 379, 385). In the present case, appellant contends that there was no showing that any characteristic burdens of transportation would be shifted to appellant from its lessees under the proposed operation; it bases this contention on the assumption that the Court in the *Drum* case limited the content of the phrase "burdens of transportation" to the cost factors involved in that case (see J.S. 11, 13-14). The assumption is erroneous; the Court in the *Drum* case recog-

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[5] Appellant mistakenly contends that "the Court below ruled against the Commission on the control issue" (J.S. 8). However, the court below merely recited appellant's contention that its lessees had "control" over the transportation operations and, citing the *Drum* case, noted that "such control is not incompatible with for-hire carriage and falls far short of establishing that the shipper-lessees are engaged in private carriage" (J.S. 30). The court was simply observing, as the Commission had held (J.S. 43), that this element of "control" is not of "all-important significance" in determining whether transportation is private or for-hire.

nized that the definition of the relevant "burdens" is a task "well within the range of the responsibility Congress assigned the Commission" (368 U.S. at 385).

In this case, as we have noted, the Commission concluded that the appellant proposed to provide "a comprehensive motor carrier service," including the furnishing and maintenance of the necessary equipment, and the procurement and payment of drivers (J.S. 43). The provision of, and the assumption of continuing responsibility for, drivers on a payroll clearly constitutes a burden of organizing and managing a transportation service, cf. *Bridge Auto Renting Corp.* v. *Pedrick*, 174 F.2d 733 (C.A. 2), certiorari denied, 338 U.S. 850; *John J. Casale, Inc.*, v. *United States*, 86 F. Supp. 167 (Ct. Cl.), certiorari denied, 338 U.S. 954, and the Commission found that the arrangement at issue here was intended to, and would in fact, "relieve the lessees of any real responsibility as employers over their drivers" (J.S. 41). The Commission also noted the similarity between appellant's proposed arrangement and the circumstances surrounding the typical arrangement for for-hire carriage (see J.S. 43).[6] We submit that, as in the *Drum* case, the Commission dealt with this situation "as an integral and unique problem

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[6] Appellant argues (J.S. 12-18) that the proposed operation must be exempt from regulation because the only difference between it and appellant's present operations outside the New York City Commercial Zone is that the drivers would be shifted from the lessees' payroll to appellant's payroll. Appellant's argument assumes that its present operations outside of the Zone are legal (*i.e.*, not subject to regulation). The Commission did not adopt that assumption; while the Examiner found appellant's present operations to be illegal (see note 3, pp. 3-4, *supra*), the Commission did not pass on that question

in judgment" (368 U.S. at 384), and that, as the district court found, the uncontroverted basic findings amply suport its exercise of judgment.

CONCLUSION

The appeal presents no substantial issue warranting plenary consideration, and the judgment of the court below should be affirmed.

Respectfully submitted,

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